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Federal and International Proceedings - United States Acceptance of International Court of Justice Compulsory Jurisdiction

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FEDERAL AND INTERNATIONAL PROCEEDINGS—UNITED STATES ACCEPTANCE OF INTERNATIONAL COURT OF JUSTICE COMPULSORY JURISDICTION—In October 1957 Switzerland, on behalf of the holding company now commonly known as Interhandel,¹ addressed an application against the United States to the International Court of Justice (I.C.J.). Claiming I.C.J. jurisdiction by reason of the United States adherence to article 36 (2) of the Statute of the Court,² Switzerland's submissions were essentially that the United States was under an obligation (1) to restore to Interhandel assets of the General Aniline and Film Corp.³ which had been seized in 1942 pursuant to the Trading with the Enemy Act,⁴ and, as an alternative, (2) to submit the

¹ Originally called I. G. Chemie, now Société Internationale Pour Participations Industrielles et Commerciales S.A. (hereafter referred to as Société Internationale), "Interhandel" is entered in the common registry of the Canton of Basle, Switzerland. *Société Internationale v. McGranery*, (D.C. D.C. 1953) 111 F. Supp. 435.

² Art. 36 (2) provides: "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. the interpretation of a treaty; b. any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature or extent of the reparation to be made for the breach of an international obligation." For the United States adherence, see Declaration of the United States of America of August 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598.

³ GAF, a Delaware corporation, was founded in 1939 as American I.C. Chemical Corp. by merger of Agfa-Ansco Corp., General Aniline Works, and Ozalid Corp. In general see Buttler, "General Aniline Nears the Block," N.Y. TIMES, August 20, 1956, p. 29:1. From its inception GAF was almost wholly owned by Interhandel. Mason, "The General Aniline and Film Co. Case," PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 114 at 114-117 (1958).

⁴ The act provides for the vesting of title to enemy owned assets in the Alien Property Custodian. 40 Stat. 411 (1917), as amended by the First War Powers Act of 1941, 55 Stat. 839 (1941), 50 U.S.C. Appx. (1952) §5 (b).

dispute to arbitration.⁵ The United States countered with four preliminary objections to jurisdiction.⁶ Most important were objections 3, that "... Interhandel ... has not exhausted the local remedies available to it in the United States courts," and 4(a), that the "sale or disposition [of GAF assets] has been determined by the United States of America, pursuant to paragraph (b) of the Conditions attached to this country's acceptance of this Court's jurisdiction [the automatic reservation],⁷ to be a matter essentially within the domestic jurisdiction of this country." By order of October 24, 1957, the court rejected, for lack of urgency, Switzerland's request to indicate interim measures.⁸ On March 21, 1959, the court rendered judgment on the preliminary objections. By a nine-judge majority, *held*, the application is inadmissible for failure to exhaust local remedies. Ten judges found it unnecessary to adjudicate upon objection 4(a), observing that the objection was made only with regard to disposition of the vested assets, and that the United States had not yet determined to make such disposition. *Interhandel Case (Preliminary)*, [1959] I.C.J. Rep. 6.

On October 21, 1948, Interhandel filed an action in the District Court for the District of Columbia⁹ seeking restoration of its vested assets on the ground that at the time of seizure it was not an enemy or ally of an enemy. Although a Swiss company, Interhandel apparently had been formed by I. G. Farben, a German chemical trust.¹⁰ The crux of the dispute was whether German ownership terminated prior to the United States' declaration of war upon Germany in 1941. In the district court the parties moved for discovery.¹¹ On July 5, 1949, Interhandel was ordered to produce the bank records of H. Sturzenegger & Cie.¹² On June 15, 1950, two weeks before the Sturzenegger records were to be produced, the Swiss Federal

⁵ Principal case at 19.

⁶ *Id.* at 10-11.

⁷ "PROVIDED, that this declaration shall not apply to . . . (b) Disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America. . . ." Declaration of the United States of America of August 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598.

⁸ *Interhandel Case (Interim)*, [1957] I.C.J. Rep. 105.

⁹ As provided for by the Trading with the Enemy Act, 40 Stat. 411 (1917), as amended by the First War Powers Act of 1941, 55 Stat. 839 (1941), 50 U.S.C. Appx. (1952) §9(a).

¹⁰ E.g., Interhandel's first president, Hermann Schmitz, also first president of American I.G. Chemical Corp., was chairman of the Board of I. G. Farben. Interhandel's original stock was issued on behalf of Ed. Greutert & Cie., predecessor of H. Sturzenegger & Cie., a private Swiss banking concern purportedly financed by I. G. Farben. Mason, "The General Aniline and Film Co. Case," PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 114 at 115 (1958).

¹¹ Pursuant to Rule 34, Fed. Rules Civ. Proc., 28 U.S.C. (1958).

¹² *Société Internationale v. Clark*, (D.C. D.C. 1949) 9 F.R.D. 263. I. G. Farben is said to have controlled Interhandel, by a system of options, pledges and loans, through the so-called "Sturzenegger Circle." In 1940 the control system was at least nominally terminated. Whether effective control was relinquished probably cannot be discovered without examination of the records of H. Sturzenegger & Cie. Mason, "The General Aniline and Film Co. Case," PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 114 at 116 (1958). "The inference is plain that an investigation of I. G. Chemie is necessarily an investigation of H. Sturzenegger & Cie." *Société Internationale v. McGranery*, note 1 *supra*, at 441.

Attorney constructively seized them through the exercise of a preventive police power, considering that submission would constitute violation of article 47 of the Swiss Bank Law¹³ and article 273 of the Swiss Penal Code.¹⁴ The court then appointed a special master, who found, *inter alia*, that Interhandel had made a good faith effort to obtain the ordered documents, that there was no evidence of collusion between plaintiff and the Swiss Government, and that "there was a substantial legal basis for the seizure under Swiss law."¹⁵ The court itself, after adopting the master's report, found "that the . . . papers were and are in the possession . . . of plaintiff and that except for their confiscation . . . plaintiff would be able to produce them."¹⁶ However, considering that to hold otherwise "would permit a foreign party to be placed in a favored position by the laws or action of his government,"¹⁷ the court then held that plaintiff "refused"¹⁸ to comply with a production order, and that dismissal with prejudice was proper.¹⁹ After considerable delay the court of appeals made a final affirmation.²⁰ On certiorari, the United States Supreme Court reversed,²¹ holding that because of "serious constitutional questions" of due process, dismissal was inappropriate.²² The case was remanded with instructions to require additional evidence of good faith, "explore plans looking towards fuller compliance," or proceed to trial on the merits.

Switzerland's application to the I.C.J. was based upon the U.S.-Swiss Washington Accord.²³ That agreement provided that Switzerland would liquidate German assets within her jurisdiction. The Swiss Compensation Office was charged with liquidation, and its decisions were subject to appeal by an Allied Joint Commission to the Swiss Review Authority. The Accord also stipulated that "the United States will unblock Swiss assets in the United States."²⁴ In February 1946 the Swiss Compensation Office determined that Interhandel was a Swiss company.²⁵ The Joint Commission indicated disagreement. On January 5, 1948, the Review Authority an-

¹³ The provision provides for banking secrecy.

¹⁴ This article creates the crime of "economic espionage."

¹⁵ *Société Internationale v. McGranery*, note 1 *supra*, at 439.

¹⁶ *Id.* at 442.

¹⁷ *Id.* at 443.

¹⁸ Within Rule 37 (b) (iii), Fed. Rules Civ. Proc., 28 U.S.C. (1958).

¹⁹ By reason of Rule 34, Fed. Rules Civ. Proc., 28 U.S.C. (1958).

²⁰ The district court suspended operation of its dismissal for three months. *Société Internationale v. McGranery*, note 1 *supra*, at 445. The court of appeals affirmed, but allowed six more months of grace. *Société Internationale v. Brownell*, (D.C. Cir. 1955) 225 F. (2d) 532. In August 1956, the district court denied plaintiff's motion to vacate dismissal, and the court of appeals reaffirmed at 243 F. (2d) 254 (1957).

²¹ *Société Internationale v. Rogers*, 357 U.S. 197 (1958).

²² "Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not willfulness, bad faith, or any fault of petitioner." *Société Internationale v. Rogers*, *id.* at 212.

²³ Of May 25, 1946. For text see 14 DEPT. OF STATE BUL. 1121-1124 (1946).

²⁴ Art. IV (1), U.S.-Swiss Washington Accord, 14 DEPT. OF STATE BUL. 1121-1124 (1946).

²⁵ The remainder of this paragraph is based upon the principal case at 17-19.

nulled blocking of Interhandel's Swiss assets, which had been provisionally blocked since 1945. In a note of May 4, 1948, to the State Department, Switzerland contended that her Review Authority's decision made the question of the nationality of Interhandel's ownership *res judicata*, by reason of the Accord, *vis-à-vis* the United States. The Department of State reply of July 26, 1948, rejected this thesis. Switzerland persisted, and in her note of September 7, 1948, requested arbitration under article VI of the Accord.²⁶ On October 12, 1948, the United States suggested that her courts were open to non-enemy aliens seeking restitution of vested assets. Correspondence was suspended until April 9, 1953, when Switzerland complained that litigation had reached a deadlock. Various notes were then exchanged, culminating in the Swiss note of August 9, 1956, which again proposed arbitration under the Washington Accord, or under the Arbitration Treaty of February 16, 1931.²⁷ The United States rejected these proposals on January 11, 1957. In a memorandum appended to the United States note the State Department recognized Switzerland's exhaustion of local remedies, although the United States Supreme Court subsequently granted *certiorari*.²⁸

On two important occasions, the instant case and the *Case of Certain Norwegian Loans (France v. Norway)*,²⁹ the I.C.J. has had before it a party whose acceptance of compulsory jurisdiction was subject to an automatic reservation. In both cases the majority of the court, prompted perhaps by a notion of expediency,³⁰ found it unnecessary to adjudicate the validity of the reservation. Six permanent judges, however, have disagreed, and specifically addressed themselves to the subject.³¹ Five of the six find the reservation invalid for three basic reasons: (1) inconsistency with article 36, paragraph 6 of the Statute of the Court,³² because the reserving state purportedly retains the right to "settle" particular jurisdic-

²⁶ "In case differences of opinion arise with regard to the application or interpretation of this Accord which cannot be settled in any other way, recourse shall be had to arbitration." U.S.-Swiss Washington Accord, 14 DEPT. OF STATE BUL. 1121-1124 (1946).

²⁷ 47 Stat. 1983 (1931), T.S. 844 (1931).

²⁸ *Société Internationale v. Rogers*, note 21 *supra*.

²⁹ [1957] I.C.J. Rep. 9. The French Declaration, reserving "differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic," was withdrawn on July 10, 1959. For English text of the new French Declaration, see ABA SECTION OF INTERNATIONAL AND COMPARATIVE LAW, REPORT ON THE SELF-JUDGING ASPECT OF THE UNITED STATES' DOMESTIC JURISDICTION RESERVATION 80 (August 1959).

³⁰ See suggestion by Boskey, PROC. CORNELL SECOND SUMMER CONF. OF INT. LAW 33 (1958) that such practice is not unusual, citing *Ex parte Bakelite Corp.*, 279 U.S. 438 at 448 (1929).

³¹ *Armond-Ugon (Uruguay)*, principal case at 90; *Guerrero (El Salvador, died 1958)*, *Case of Certain Norwegian Loans*, note 29 *supra*, at 43; *Klaestad (Norway)*, principal case at 75; *Lauterpacht (United Kingdom)*, *Case of Certain Norwegian Loans*, note 29 *supra*, at 43, principal case at 95; *Sir Percy Spender (Australia)*, principal case at 54. Judge Read (Canada, term expired 1958) found the French reservation involved a good-faith determination and hence was not automatic. *Case of Certain Norwegian Loans*, note 29 *supra*, at 94.

³² "6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

tional disputes by its own decision, (2) fundamental inconsistency with the article 36(2) concept of jurisdiction "compulsory *ipso facto* and without special agreement,"³³ and (3) failure of the acceptance, including the reservation, to constitute a legal obligation because the existence and extent of the obligation is dependent upon ad hoc unilateral determination by the accepting government.³⁴ One judge has attacked the validity of these propositions on the basis of an implied requirement of good faith in invocation of automatic reservations, which would make them subject to judicial review,³⁵ but he seems clearly wrong insofar as the intent of the United States Senate is concerned.³⁶ The major difficulty, if any, seems to be the relation between these reasons and a conclusion that the United States' reservation is invalid. Although the United States' condition (b) may be somewhat different from a reservation to an ordinary multilateral treaty, it is clearly analogous. Based on the theory that a state cannot be bound without its consent, according to the traditional view, a ratification with reservation of a multilateral treaty is inoperative unless all parties to the treaty accept such reservation.³⁷ Hence, the first of the above reasons for invalidity has some precedent in international law. According to a relatively recent position taken by the I.C.J., however, ratification with a reservation which is compatible with the *raison d'être* of the treaty may, in some circumstances, be operative without subsequent universal consent.³⁸ The second reason for invalidity would take automatic reservations to the compulsory jurisdiction of the court out of any such special class. The last reason is founded upon a conceptualistic notion of legal act, roughly analogous to the Anglo-American contract notion of illusory promise.

³³ The text of art. 36(2) is quoted in note 2 *supra*.

³⁴ Lauterpacht bases this objection on a "generally recognized principle of law," presumably within art. 38(c) of the Statute of the Court, which authorizes application by the court of "general principles of law recognized by civilized nations." Case of Certain Norwegian Loans, note 29 *supra*, at 49.

³⁵ Armond-Ugon, principal case at 93-94.

³⁶ See statements by Loftus Becker, Legal Adviser to the State Department, Proc. CORNELL SECOND SUMMER CONF. ON INT. LAW 144-147 (1958); Lauterpacht's historical survey in the principal case at 107-111. See also Senator Connally's explanations of the condition, which he introduced as an amendment, in 92 CONG. REC. 10624, 10695 (1946).

³⁷ See, e.g., statement of Adrian Fisher while Legal Adviser to the State Department, Senate Hearings before a Subcommittee of the Committee on Foreign Relations on the Genocide Convention, 81st Cong., 2d sess., p. 134 (1950); United Kingdom Memorandum annexed to the September 20, 1950, Report of the Secretary-General Assembly, U.N. Doc. No. A/1372 (1950).

³⁸ While accepting the principle of universal consent, the court noted that with regard to the Genocide Convention the purpose of the General Assembly and adopting states was that "as many States as possible should participate," and concluded that the parties had therefore tacitly consented in advance to reservations which did not "frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention." Advisory Opinion on Reservations, [1951] I.C.J. Rep. 15, 45 AM. J. INT. L. 579 (1951).

An additional problem may center on the possible separability of adherence and condition (b). One judge,³⁹ with an oblique reference to American practice of attempting to institute actions against Communist states concerning aerial incidents,⁴⁰ concluded the United States intended to make a valid adherence. Admitting some ambiguity in the American position,⁴¹ it would seem that the intent of the United States Senate, which originated the condition, was to accept compulsory jurisdiction only in principle. This is consistent with the established Senate position of giving only token acknowledgment to the notion of compulsory international adjudication while jealously guarding the prerogatives of the United States.⁴² Nevertheless, it would be expedient, perhaps, for the court to continue to avoid decision on this delicate question until absolutely necessary. Because of the condition of reciprocity built into I.C.J. compulsory jurisdiction,⁴³ any state against whom the United States attempted to bring an action could take advantage of the unfortunate condition (b).⁴⁴ Hence, the conclusion of no jurisdiction could almost always be based on invocation of the condition, assuming, *arguendo*, the condition's validity. If adherence is not judicially eliminated the repugnant condition may not, in particular disputes, be invoked, and the court could possibly find the question of validity moot by reason of jurisdiction based on implied consent. It would seem that the only possible situation requiring adjudication of the validity of the adherence would be an application to set aside a default judgment. This seems unlikely.

One must finally decide whether the United States should withdraw the "as determined by the United States" language of condition (b). In particular the Senate seems to have been concerned with the possibility of an adverse international decision on immigration, tariffs, or the Panama Canal.⁴⁵ The American Bar Association Section of International and Comparative Law has concluded that there is negligible risk of a present holding that these areas are not essentially within the domestic jurisdiction of the United States as determined by international law.⁴⁶ A non-automatic

³⁹ *Armond-Ugon*, principal case at 93-94.

⁴⁰ E.g., *Case of the Treatment in Hungary of Aircraft of U.S.A.* (U.S. v. Hungary), [1954] I.C.J. Rep. 99; *Aerial Incident of Oct. 7th, 1952* (U.S. v. U.S.S.R.), [1956] I.C.J. Rep. 9; *Aerial Incident of March 10th, 1953* (U.S. v. Czechoslovakia), [1956] I.C.J. Rep. 6. In each of these cases the court rejected the American action because the defendant had not accepted compulsory jurisdiction.

⁴¹ In addition to the aerial cases, note 40 *supra*, see *State of the Union Message*, 40 DEPT. OF STATE BUL. 115 at 118 (1959); Becker, "Some Political Problems of the Legal Adviser," 38 DEPT. OF STATE BUL. 832 (1958).

⁴² See note 36 *supra*.

⁴³ See note 2 *supra*.

⁴⁴ This is what happened to France in the *Case of Certain Norwegian Loans*, note 29 *supra*.

⁴⁵ See Senator Connally's remarks, 92 CONG. REC. 10624 (1946).

⁴⁶ ABA SECTION OF INTERNATIONAL AND COMPARATIVE LAW, REPORT ON THE SELF-JUDGING ASPECT OF THE UNITED STATES' DOMESTIC JURISDICTION RESERVATION 43-44 (August 1959).

reservation of domestic jurisdiction, although surplusage,⁴⁷ would not be objectionable. The present reservation, however, detracts from United States leadership in advocating a world-wide rule of law. Further, it substantially detracts from the growth of such a system,⁴⁸ the alternative to which would seem to be either non-settlement of disputes, or settlement by force or threat of force. It also leaves the ever-increasing interests abroad of both the United States Government and United States nationals subject to the risk that a foreign government will, by reciprocal use of the reservation, evade what otherwise would have been an obligation to adjudicate a perfectly valid American claim. Of course the problem is difficult: at bottom seems to lie the irreconcilability of advocating law while firmly resolved to protect, regardless of illegality, what are thought to be vital national interests. In this regard, aside from the moral question, it might be well to observe that the United States already holds the right to veto Security Council enforcement of an adverse judgment.⁴⁹

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⁴⁷ In the following seven international court decisions the court has recognized its lack of jurisdiction over matters exclusively domestic: *Tunis-Morocco Nationality Decrees* (Advisory Opinion), P.C.I.J., Ser. B, No. 4 (1923); *Treatment of Polish Nationals in Danzig* (Advisory Opinion), P.C.I.J., Ser. A/B, No. 44 (1932); *The Losinger*, P.C.I.J., Ser. A/B, No. 67 (1936); *Electricity Co. of Sofia and Bulgaria*, P.C.I.J., Ser. A/B, No. 77 (1939); *Anglo-Iranian Oil Co.*, [1951] I.C.J. Rep. 89; *Right of Passage over Indian Territory*, [1957] I.C.J. Rep. 6; and *Interpretation of Peace Treaties with Bulgaria, Hungary, and Rumania* (First Phase, Advisory Opinion), [1949] I.C.J. Rep. 229. In all cases except the last, where "essentially" was used, it was asserted that the matters were "exclusively" domestic. Based on a study of these cases, Briggs, "The U.S. and the I.C.J.: a Re-Examination," 53 AM. J. INT. L. 301 at 304-305 (1959), concluded: (1) within this context the court finds no significant difference between "exclusively" and "essentially"; (2) whether a matter is exclusively within domestic jurisdiction is a question of international law; (3) disputes are not exclusively domestic if they "arose out of matters which were governed by treaty or other principles of international law and determination of the rights of the parties involved an examination of their obligations under international law"; (4) when confronted with a plea of domestic jurisdiction the court proceeds to determine its competence, and (5) if incompetent, refrains from rendering a decision on the merits.

⁴⁸ The following states have accepted American leadership in reserving to themselves the right to decide whether a particular reservation is applicable to a given dispute: India (1956, acceptance of jurisdiction withdrawn 1957), Mexico (1957), France (1949, reservation withdrawn 1959), Liberia (1952), Union of South Africa (1955), Pakistan (1957), The Sudan (1958) and the United Kingdom (1957, reservation withdrawn 1958). ABA SECTION OF INTERNATIONAL AND COMPARATIVE LAW, REPORT ON THE SELF-JUDGING ASPECT OF THE UNITED STATES' DOMESTIC JURISDICTION RESERVATION 22-23 (August 1959).

⁴⁹ "2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." CHARTER OF THE UNITED NATIONS, Art. 94. (Emphasis supplied.) Art. 23(1) provides that the United States shall be a permanent member of the Security Council. Art. 27(3) provides, inter alia, that on all matters not procedural Security Council decisions "shall be made by an affirmative vote of seven members including the concurring votes of the permanent members." (Emphasis supplied.)